No. 12,679

IN THE

United States Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,

Appellee-Plaintiff.

APPELLANTS' OPENING BRIEF

Upon Appeal from the District Court of the United States for the District of Arizona

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JURISDICTIONAL STATEMENT

This is an appeal by Howard Brown, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton

and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown, as defendants, from a final judgment against them in the District Court of the United States for the District of Arizona, in favor of Cowden Livestock Co., a corporation, as plaintiff, entered on July 5, 1950.

Jurisdiction of the appeal exists under and by virtue of Sections 1291 and 2107, Judicial Code, Title 28, U. S. C. Jurisdiction existed in the District Court under and by virtue of Sections 1391 and 1441 et seq., Title 28 U.S.C.

Plaintiff instituted the action on February 28, 1948, by filing its complaint in the Superior Court of Arizona (R. 5). Within the time in which defendants were to answer such complaint, defendants caused the action to be removed to the District Court of the United States for the District of Arizona on the grounds that diversity of citizenship existed and that the matter in controversy exceeded $3,000.00 exclusive of interest and costs (R. 9-19). Defendants subsequently filed answer to the complaint in said Court (R. 19).

The action was tried before the District Court, and subsequently, on July 5, 1950, said Court entered its judgment in favor of plaintiff (R. 31-39). On August 3, 1950, and within the time prescribed by law, defendants filed their Notice of Appeal accompanied by a supersedeas bond (R. 39). The record on appeal was docketed and filed in this Court on September 11, 1950, within the time prescribed by law (R. 55).

STATEMENT OF THE CASE

PREFATORY NOTE

For the convenience of the Court, there is attached, as a frontispiece hereto, a detachable addendum setting forth a chronological timetable of the events herein related.

In October, 1946, Cowden Livestock Co., hereinafter called plaintiff, one Roy Adams, of Tucson, Arizona, and one George Porter of Amarillo, Texas, entered into a three-party arrangement* pertaining to some 1961 head of steers then located near Nogales, Arizona, and then owned by the Slash Cattle Company, a partnership, of which Adams was a member (R. 58, 64, 65, 110, 111).

Between October 15, 1946, and November 15, 1946, all of the cattle were shipped by Adams from Nogales to Porter at Amarillo (R. 54). On November 15, 1946, plaintiff paid Slash Cattle Company $184,660.40 for the cattle by means of a draft on the Valley National Bank executed on behalf of plaintiff by Adams (R. 60, 61).

All but 1213 of the 1961 head of cattle shipped to Amarillo were disposed of at Amarillo pursuant to the arrangement. Only the 1213 head are involved in this cause (R. 67, 68, 116-118, 136).

Early in February, 1947, Adams, by telephone, entered into an agreement with the partnership known as Sinton & Brown, hereinafter called defendants, under which he purported to sell to defendants an undivided one-half interest in the 1213 head for an amount that was to be calculated by multiplying 16¢ times one-half the gross weight of the cattle (R. 225-228). Under this arrangement:

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*The undisputed facts as to the details of this arrangement are hereinafter set forth under Item I of the Argument (pp. 13, 14, 15, *infra*).

(a) at the outset, defendants were to advance, in addition to the sum above, an amount to be calculated by multiplying 15¢ times one-half the gross weight of the cattle (R. 227, 228);

(b) the cattle were to be shipped to the defendants' Santa Maria, California, feed lots where they were to be eventually sold by defendants (R. 227);

(c) defendants were to feed the cattle at the Santa Maria feed lots for an agreed upon daily feeding charge (R. 227);

(d) upon the eventual sale of the cattle, defendants were to keep one-half of the net profits, to be calculated by deducting the freight bill (from Amarillo to Santa Maria) and the defendants' advances and feed bill from the sale proceeds (R. 76, 227).

Neither at the time of the making of this agreement nor during any transactions thereafter had between defendants and Adams, did Adams represent to defendants that plaintiff had any interest in the cattle (R. 259).

Adams had been authorized by plaintiff to close a deal with defendants (R. 121). It was plaintiff's understanding that the agreement involved the features enumerated (b), (c) and (d) in the paragraph above, but that the agreement did not involve the sale of an undivided one-half interest in the cattle (R. 70, 71, 74-76, 119-121).

On February 14, 1947, defendants delivered to Adams its draft in the sum of $16,000.00 payable to Adams as a deposit on the sums due under the agreement. Adams cashed this draft on February 18, 1947 (R. 230, 231).

Between April 1, 1947, and April 8, 1947, Porter shipped

the cattle from Amarillo to the defendants' feed lots at Santa Maria (R. 54).

On April 28, 1947, defendants in Santa Maria wrote a letter to Porter in Amarillo asking for the loading weights of the cattle (R. 235). Not having received a reply to their letter, defendants in Santa Maria, on May 9, 1947, sent plaintiff in Phoenix, Arizona, the following telegram (R. 77):

"May 9, 1947

"Ray Cowden
Cowden Livestock Co.
Phoenix, Arizona

I have been trying to get the Texas loading weights on the Adams cattle which we are feeding here. Roy tells me they are in your office and has authorized me to ask you for them. Would very much appreciate it if you could send them here 101 N. Broadway, Santa Maria, Calif. Thank you.

Howard Brown."

On May 10, 1947, in response to defendants' letter of April 28th, Porter in Amarillo sent to defendants in Santa Maria a telegram giving the loading weights of the cattle (R. 236). On May 16, 1947, defendants in Santa Maria mailed to Adams in Tucson their draft on the Livestock Loan Department of the Bank of America, Los Angeles, California, payable to Adams, in the sum of $129,314.45, which said sum represented 15¢ times 968,763 pounds, the total weights as set forth in the Porter-defendants' telegram, less the $16,000.00 deposit previously paid Adams. This draft was cashed by Adams on July 9, 1947, and paid by the Bank of America on July 12, 1947 (R. 239, 241).*

*It was on August 22, 1947 that defendants, in receiving their first statement of account from the Livestock Loan Department of

On May 15, 1947, plaintiff in Phoenix mailed to defendants in Santa Maria the following letter (R. 81, 82):

"Mr. Howard Brown
101 North Broadway
Santa Maria, California.

Dear Mr. Brown:

We are very sorry that it has taken so long to reply to your telegram. We did not have the weights of the Adams cattle here but had been trying for three weeks to obtain them from George Porter, and after a considerable exchange of telegrams, we have finally succeeded in obtaining them. Porter shipped a total of 1214 steers which weighed 973,700 pounds.

Ray talked with Roy Adams in Tucson yesterday and in view of the short time these steers will be in the feedlots we do not think it will be necessary to make the advance of 15¢ per pound at this time.

When any sales are made from this bunch of steers, please make the sales for the account of Cowden Livestock Co. and remit the proceeds to us at the above address.

Yours very truly,

Cowden Livestock Co.
(signed)
C. A. Clements."

This was the only communication from plaintiff to defendants pertaining to the cattle prior to August 9, 1947 (R. 103, 124, 142).

On May 19, 1947, defendants in Santa Maria mailed to Adams in Tucson their check for $4,843.81 which repre-

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the Bank of America since May 12, 1947, learned for the first time that this draft was outstanding until July 12, 1947 (R. 246, 302, 306, 307).

sented 1¢ times one-half of 968,763 pounds, the total weights as set forth in the Porter-defendants' telegram. Adams cashed this check on May 24, 1947 (R. 243, 245).

By the end of June, 1947, defendants had sold all of the cattle, receiving gross proceeds in the amount of $240,-245.03 (R. 132, 133).

On July 5, 1947, at defendants' offices in Santa Maria, defendants delivered to Adams their check in the sum of $19,454.27, representing one-half of the net profits from the sale of the cattle after deduction of feed charges, freight, and prior payments by defendants to Adams. This check was cashed by Adams on July 8, 1947 (R. 247-249). Upon the delivery of this check by defendants to Adams, the defendants also gave Adams certain statements of account, setting forth defendants' expenses, advances and computing the profits arising from the sales (R. 132, 133, 249-251). The aggregate total of the amounts transmitted by defendants to Adams equalled all of the monies which plaintiff, Adams and Porter were entitled to receive from the sale proceeds (R. 105, 106).

On Tuesday, July 8, 1947, plaintiff in Phoenix called Adams in Tucson by telephone (R. 84). Adams told plaintiff that all of the cattle had been sold (R. 84); that defendants had sent him a check for the cattle (R. 102); and that he had a statement of sales (R. 84). Plaintiff asked that Adams mail the papers to plaintiff, and a meeting was arranged between plaintiff and Adams in Phoenix for Wednesday, July 16, 1947 (R. 84, 85). Having received said papers from Adams, plaintiff, by July 16, 1947, had drawn up certain settlement sheets (R. 85, 86, 159).

On Wednesday, July 16, 1947, Adams met with the officers

of plaintiff, in Phoenix. Adams was presented with the settlement sheets and, upon his objection to the interest rate of five per cent applied to plaintiff's advances, the figures were recomputed and corrected on the basis of four per cent interest (R. 158). After the meeting one copy of the corrected settlement sheets was given to Adams (R. 211, 212), one copy was sent to Porter (R. 199, 200), and one copy was retained by plaintiff (R. 134, 135, 213). The final page of said settlement sheets reads as follows (R. 211):

"COWDEN LIVESTOCK CO.
SETTLEMENT WITH ROY ADAMS ON TEXAS STEER DEAL

Cowden Advances and Interest		$244,441.98
Cowden Share of Profit		6,409.03
		$250,851.01
Repayments:		
732 Steers Sold	$ 92,943.63	
8 Steers Sold	1,112.89	
Adams Check	112,000.00	$206,056.52
Due from Adams		$ 44,794.49."

At this July 16, 1947 meeting Adams gave plaintiff his personal check in the sum of $112,000.00 (R. 86, 103). This check was immediately cashed and the proceeds therefrom received by plaintiff (R. 86, 103, 142).

At this time, Adams also gave plaintiff his personal check in the sum of $44,794.49 (R. 86, 103). Adams told plaintiff that he had the proceeds of the settlement with defendants available for payment to plaintiff but desired to use such proceeds temporarily (R. 35, 36), saying that he had used a portion of the money out of the steers to buy another bunch of cattle which he had shipped on Monday and Tuesday (July 14, 15) and that he would have the

return on that shipment on the following Monday (July 21) (R. 86, 143).* Adams therefore requested that the check for $44,794.49 not be deposited for payment until Saturday, July 19, 1947 (R. 86, 104, 143).

Plaintiff held this check until Saturday, July 19, 1947, and then deposited same for collection (R. 86, 104). On Wednesday, July 23, 1947, the check was returned unpaid for insufficient funds (R. 87). Thereafter plaintiff contacted Adams and at his suggestion redeposited the check for collection (R. 87, 104). When about a week later (July 31), the check was returned the second time, plaintiff again contacted Adams (R. 87). Early in August plaintiff determined that the check was uncollectible (R. 87, 105). If plaintiff had received the proceeds from this check it would have received all of the monies to which plaintiff in its own right was entitled from the sale of the cattle (R. 94, 95, 100-102, 149).

On August 9, 1947 plaintiff made written demand upon defendants for the sum of $57,612.53† and on August 13, 1947 defendants refused said demand (R. 89, 90, 92, 93). Adams subsequently died (R. 101).

Plaintiff instituted suit alleging in two counts that defendants are indebted to plaintiff in the sum of $57,612.53 on account of their alleged failure to remit proceeds from the cattle sales in that sum, and on account of their wrongfully withholding of said sum allegedly the property of

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*The two checks were accepted by plaintiff in the belief that Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks (R. 339).

†For the basis for computation of this amount see the introductory note to Item II of the Argument (p. 21 *infra*).

plaintiff. Defendants answered both counts by pleading:

(a) A general denial of indebtedness and of wrongful withholding of any sums belonging to plaintiff;

(b) Receipt of payment by plaintiff;

(c) Estoppel and waiver;

(d) Ratification and waiver;

(e) Defect in parties-plaintiff.

Trial before the Court was had on February 8, 9, 1949 and on July 5, 1950 the Court entered its Findings of Fact, Conclusions of Law and Judgment in favor of plaintiff in the sum of $44,794.49, with interest thereon from August 9, 1947 until paid. Thereafter defendants perfected this appeal.

The questions involved in this appeal are:

(1) Did the lower court err in failing to dismiss plaintiff's complaint for the nonjoinder therein of George Porter and Roy Adams as indispensable parties-plaintiff?

(2) Did the lower court err in failing to enter judgment for defendants?

(3) Are the lower court's Findings of Fact clearly erroneous, or are its Conclusions of Law contrary to law?

SPECIFICATION OF ERRORS

I.

The District Court erred in failing to dismiss plaintiff's complaint for nonjoinder of George Porter and Roy Adams as indispensable parties-plaintiff because the documentary evidence and undisputed facts established that said parties were the plaintiff's copartners or joint venturers.

II.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts established that plaintiff has received payment of all monies which it seeks in its own behalf.

III.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts established that plaintiff is estopped to claim the monies for which recovery is sought in the complaint.

IV.

The District Court erred in entering judgment for plaintiff because the documentary evidence and undisputed facts establish that plaintiff ratified the act of its agent in collecting the monies for which recovery is sought in the complaint.

V.

The District Court erred in entering judgment for plaintiff for the reasons that the Findings of Fact upon which its Conclusions of Law and Judgment rest are clearly erroneous, and the Conclusions of Law as embodied in its Findings of Fact upon which its Judgment rest are contrary to law because the documentary evidence and undisputed facts establish that:

(A) The cattle in question and the proceeds therefrom were the property of the joint venture comprised of plaintiff, Porter and Adams. (All Findings of Fact and Conclusions of Law in Findings 3, 4, 5 and 16 contrary thereto are clearly erroneous and contrary to law.)

(B) Defendants paid Adams all monies from the sale proceeds to which plaintiff, Adams and Porter were entitled; on July 16, 1947, plaintiff did know that defendants had paid to Adams the amounts enumerated in Finding No. 11; plaintiff did approve of the manner in which the transaction had been handled; plaintiff did know all of the material circumstances surrounding the transactions between Adams and defendants; plaintiff accepted Adams' personal checks unconditionally; and defendants did suffer detriment by virtue of the action of plaintiff in accepting said checks. (All Findings of Fact and Conclusions of Law in Findings 10, 11, 12 and 14 contrary thereto are clearly erroneous and contrary to law.)

(C) Defendants, in paying Adams, did so with knowledge that Adams was plaintiff's agent; plaintiff in accepting the checks of Adams did ratify and intend to ratify Adams' act in collecting the sale proceeds from defendants; and plaintiff in making settlement with Adams did so with full knowledge of all the material facts and for the purpose of closing out the plaintiff-Porter-Adams arrangement. (All Findings of Fact and Conclusions of Law in Findings 17, 18 and 19 contrary thereto are clearly erroneous and contrary to law).

SUMMARY OF ARGUMENT

The undisputed facts of this case, stripped of all conclusions and inferences, have been set forth in the Statement of the Case. From these undisputed facts, this Court must determine whether the lower court erred, when, on

July 5, 1950, some seventeen months after the court trial of the case, it entered judgment for the plaintiff and adopted bodily as its own the Findings of Fact and Conclusions of Law advanced by plaintiff.

These undisputed facts upon which the lower court's judgment must be bottomed make it clear that:

I.

The plaintiff-Porter-Adams arrangement was that of a joint venture and the plaintiff's nonjoinder of Porter and Adams as indispensable parties-plaintiff is fatal to its recovery (Specifications I and V (A)).

II.

The plaintiff has received payment of the monies to which it is entitled (Specifications II and V (A), (B) and (C)), inasmuch as (A) defendants paid all monies due from them to Adams, who, as joint venturer or agent of plaintiff, was authorized to receive same, and (B) plaintiff accepted payment and other performance by Adams as full satisfaction of any claim against defendants.

III.

The defendants are innocent parties in this matter and since it was plaintiff's acts and acquiescence for more than three weeks in Adams' collection of the monies in question which caused the loss, plaintiff must bear that loss (Specifications III and V (B)).

IV.

The plaintiff in settling with Adams, accepting his checks, and acquiescing thereafter, for more than three weeks, in

Adams' collection of the monies, thereby ratified his collections (Specifications IV and V (C)).

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers (Specifications I and V(A)).

A. PLAINTIFF, PORTER, AND ADAMS WERE ENGAGED IN A JOINT VENTURE.

The elements of a joint venture are (48 *C.J.S.* p. 809, sec. 2):

(1) A community of interest and a common purpose.

(2) A joint proprietary interest in the subject matter, contributed in some form by the respective parties.

(3) Joint participation in the management of the enterprise.

(4) The sharing of losses.

(5) The sharing of profits.

The undisputed facts establish that each and all of these elements were attributes of the plaintiff-Porter-Adams arrangement:

(1) Community of interest—

The parties were to share equally in any profits or losses resulting from the cattle (R. 65, 108, 109, 203, 207) which were to be shipped at the outset to Porter for feeding (R. 65, 107, 108).

(2) Joint proprietary interest—

(a) Plaintiff, having advanced the purchase monies for the cattle (R. 60), was to advance all further monies necessary for the shipping of the cattle to Amarillo and for

the feed bills at Amarillo (R. 67, 149). These monies with interest thereon were to be deducted from the eventual sale proceeds of the cattle before the parties' equal participation in the eventual profit or loss was to be determined (R. 85, 86, 157, 158, 211, 212).

(b) Adams was to assist in securing feed or securing a buyer and arranging shipments; to inspect the cattle periodically and report on their feeding progress; to assist in the management of the deal to make it as profitable as possible; and to give plaintiff and Porter the benefit of his experience and judgment in handling the deal (R. 111-113, 207).

(c) Porter was in sole charge of the Amarillo feeding end of the deal, where he was to place the cattle on pasture, deal with the people growing pasture there, and supervise the handling and care of the cattle (R. 112, 113, 203).

(3) Joint participation in management—

(a) The cattle were shipped to Amarillo after discussion by the three parties (R. 107, 108).

(b) The sale of the portion of the 1961 head not involved here and sold to Hulett was made after discussion by the three parties (R. 117).

(c) The parties participated in the decision as to the movement of the cattle to Santa

Maria (R. 73, 74, 118, 120, 194, 195, 204); the decision as to the deal with defendants (R. 76, 121); and the decision as to the selling price to be asked for the cattle (R. 83, 84, 124, 125).

(4) Sharing in losses—

and

(5) Sharing in profits—

The parties were to bear any eventual losses or profits equally (R. 65, 108, 109, 203, 207).

It is of interest that both plaintiff (R. 116) and Porter (R. 195), when left to their own explanation as to who made the decisions and took certain actions, used the term "we." Further, in describing his understanding of the deal with defendants, plaintiff's president quite candidly referred to the "owners" of the cattle (R. 70). Indeed, this same president later volunteered that the whole arrangement was a "feed venture" (R. 140). Also significant is the fact that the arrangement is not distinguishable from the "Agreement of Joint Adventure" (R. 169-173), governing the operations of the Slash Cattle Company, which, in the words of plaintiff's president, "was a partnership" (R. 58).

These undisputed facts pertaining to the plaintiff-Porter-Adams arrangement demonstrate conclusively that the arrangement was a joint venture, which under Arizona law has been described as a partnership formed for "a single transaction, although the business of conducting it may continue for a number of years." (*Ruby v. United Sugar Co.*, 56 Ariz. 535, 109 P.2d 845, 850 (1941)).

It should be specifically noted that the sharing of losses, a feature foreign to a mere agency relationship and which has been held crucially determinative by the Arizona court (*Burney v. Smith,* 64 Ariz. 186, 167 P.2d 386, 389 (1946)), was a vital part of the plaintiff-Porter-Adams arrangement.

In strikingly analagous situations, the courts have held almost identical arrangements to be joint ventures:

Mid-Columbia Production Credit Ass'n v. Smeed, 171 Ore. 140, 136 P.2d 255 (1943) (A and B held to be joint venturers where engaged in buying and selling sheep; A would purchase sheep with own check and then draw on B for purchase price; eventual profits split 50-50 after deduction from sale proceeds of expenses and B's advances).

Moore v. Diehm, 200 Okl. 664, 199 P.2d 218 (1948); followed in *Moore v. Beier,* ..... Okl. ....., 210 P.2d 359 (1949) (A and B held to be joint venturers where engaged in buying and selling livestock; A would buy same by check on account financed by B; B would sell same at his pavilion; profits and losses split 50-50 after deduction from sale proceeds on *recapitulation sheets* of expenses and B's advances).

B. LESS THAN ALL JOINT VENTURERS CANNOT SUE ON OBLIGATION TO JOINT VENTURE.

Rule 19(a) of the *Federal Rules of Civil Procedure,* which is identical in language to Section 21-509, A.C.A. 1939, requires that "persons having a joint interest shall be made parties." Under this Rule, failure of a plaintiff to join an "indispensable" party-plaintiff denies the court the right to grant such a plaintiff any relief whatsoever and requires dismissal of a plaintiff's complaint.

6 *Cycl. Fed. Proc.,* pp. 200, 201, Section 2136;

2 *Moore's Federal Practice,* p. 2160.

A review of the authorities leads defendants to the conclusion that there are only two reported cases wherein this issue was involved in a joint venture situation. These two cases both hold that the several joint venturers are "indispensable" parties and, absent the joinder of all of them, the plaintiff's complaint must be dismissed.*

Bernitt v. Smith-Powers Logging Co., 184 F. 139 (C.C. Ore. 1911);

W. W. Oil Co., Inc. v. American Supply Co., ... La. App. ....., 8 So.2d 384, 385 (1942).

In the case first cited above the court said at page 142:

> "It is clear that the demurrer to the complaint must be sustained * * *. The case, therefore, is one where two out of three joint owners are suing a third party for a debt due the partnership or joint enterprise * * *. The law does not tolerate the splitting up of demands in bringing suit thereon. A defendant is entitled to have the entire claim prosecuted against him, or none, unless relinquished in part, and one or more members of a copartnership, less than the whole, cannot proceed to recover their undivided interest in a debt against any debtor of the firm. This is so elementary that it needs no authorities to sustain it * * *."

Since, however, a joint venture is merely a partnership for a single venture *(Ruby v. United Sugar Co., ante),* and

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*There is dicta to the contrary in *Sime v. Malouf,* ..... Cal. App. ....., 213 P.2d 788, 789 (1950). Since, however, the question of indispensability of parties must be determined by Federal rather than State rules (*Chicago, M. St. P. & P. R. Co. v. Adams County,* 72 F.2d 816, 818 (C.C.A. 9, 1934); *DeKorwin v. First Nat. Bank of Chicago,* 156 F.2d 858, 860 (C.C.A. 7, 1946)), the *Bernitt* decision and not the opinion of the California appellate court is controlling.

is governed by the law of partnership (48 *C.J.S.*, p. 806, sec. 1), decisions on this issue where a partnership is involved serve to supplement the authorities cited above. Such decisions establish that copartners are indispensable parties-plaintiff in a suit upon an obligation to the partnership and failure to join all partners is fatal:

Seltzer v. Chadwick, 26 Wash. 2d 297, 173 P.2d 991, 993 (1946);

Midland Oil Co. v. Moore, 2 F.2d. 34, 36 (CCA 8 1924);

Moores v. Inhabitants of Town of Springfield, ... Me. ....., 64 A.2d 569, 574 (1949);

Buch v. Newsome, 129 N.J.L. 585, 30 A.2d 579 (1943);

City of Orlando v. Murphy, 77 F.2d 702, 703 (CCA 5 1935).

In the case first cited above the Supreme Court of Washington unequivocally stated the rule to be:

"In order to maintain an action upon a partnership asset, the partners must be joined as parties to the action." *(Seltzer v. Chadwick, supra).*

This Court has been the leader in defining what is an "indispensable" party within Rule 19(a):

Chicago M. St. P. & P. R. Co. v. Adams County, 72 F.2d 816, 818, 819 (CCA 9 1934);

State of Washington v. United States, 87 F.2d 421, 427, 428 (CCA 9 1936).

In this last cited case this Court laid down the following test for determining whether a person in an indispensable party:

"There are many adjudicated cases in which expressions are made with respect to the tests used to deter-

mine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

"If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable." *(State of Washington v. United States, supra).*

Plaintiff, by the very amount for which it has prayed judgment, has established that plaintiff, Porter and Adams are interested in the controversy. Where, as here, a copartnership or joint venture is involved, Nos. 1, 2 and 4 of this Court's determinative questions above must be answered in the negative. In the first place, absent one of the partners or joint venturers, less than all could have their interests in the partnership or joint venture determined ex parte. Secondly, such an ex parte determination could result in a subsequent double recovery from the third party

if the absent copartner or joint venturer were thereafter to sue and to establish that his interest in the partnership or joint venture was contrary to that established ex parte in the original suit.

The defendants therefore submit that the learned lower court erred in failing to dismiss plaintiff's complaint for nonjoinder by plaintiff of the indispensable parties-plaintiff, its joint ventures Porter and Adams, and in making the Findings designated above under Specification V (A). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled (Specifications II and V(A), (B) and (C).

INTRODUCTORY NOTE

Following is a recapitulation of the various remittances made by defendants to Adams, and a brief statement of the plaintiff's basis for computing the amount of monies prayed for in its complaint:

RECAPITULATION OF DEFENDANTS-ADAMS REMITTANCES

Date	Amount	Calculation
Feb. 14, 1947 (R. 231)	$ 16,000.00	Advance on monies to be paid under agreement.
May 16, 1947 (R. 239)	$129,314.45	15¢ times 968,763 pounds the weights set forth in the Porter-defendants telegram minus the $16,000.00 advance above. (Defendants were to advance 15¢ per pound on all the cattle (R. 227.))

Date	Amount	Calculation
May 19, 1947 (R. 243)	$ 4,843.81	1¢ times ½ of 968,763 pounds, the weights set forth in the Porter-defendants telegram (Defendants were to advance 16¢ per pound on one-half of the cattle (R. 227, 245)).
July 5, 1947 (R. 248)	$ 19,454.27	½ of the net profits from the sale of the cattle after deducting from the sale proceeds defendants' advances to Adams, the freight bill and feed bill (R. 250, 251).
Total remittances	$169,612.53	

All of these monies were received by Adams (R. 231, 239, 243, 248). Therefore, if Adams had authority to receive such monies as a joint venturer or agent of plaintiff, plaintiff has been paid any portion thereof to which it is entitled.

BASIS OF COMPUTATION OF THE AMOUNT PLAINTIFF SEEKS TO RECOVER

$169,612.53—Total remittances by defendants to Adams	$44,794.49—The amount of monies to which plaintiff is entitled out of the plaintiff-Porter-Adams arrangement, and the amount of the Adams-plaintiff check which eventually proved worthless.
$112,000.00—Amount of one of Adams-plaintiff's checks	
	$ 6,409.02—Adams' share of the profits from the arrangement.
	$ 6,409.02—Porter's share of the profits from the arrangement.
$ 57,612.53	$57,612.53—Total amount for which recovery is sought.

The sum of $44,794.49 (the amount of the lower court's judgment) is admitted by plaintiff to be the total amount to which plaintiff is entitled in its own right from the arrangement (R. 94, 95, 100-102). On July 16, 1947, plaintiff accepted Adams' personal check in this sum, and consented to hold same before attempting collection until July 21, 1947 (R. 86, 103, 104, 143).* At the time of accepting this check plaintiff also accepted another of Adams' personal checks in the sum of $112,000.00. Plaintiff immediately deposited this check for collection and received it proceeds. This last sum, in addition to $44,794.49, totaled the amount to which plaintiff was then entitled out of the sale proceeds. Therefore, if plaintiff accepted these two checks as payment and other performance by Adams in full satisfaction of any claim against defendants, defendants are discharged from all obligation to plaintiff.

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

Since the plaintiff-Porter-Adams arrangement was a joint venture, which is governed by the law of partnership (see Argument I, *ante),* Adams, in the absence of an agreement with his joint venturers to the contrary, had implied authority to receive payment of the monies owing to the joint venture. (40 *Am. Jur.,* sec. 158, p. 241; 47 *C.J.,* sec. 332, p. 860). As stated in the last cited treatise, the elementary rule is that:

> "Every partner has implied authority to receive payment of firm debts, in the absence of an agreement to

*While the understanding was to not deposit the check until July 19, 1947 (Saturday), it is clear that the parties realized that collection was not to be effectuated until July 21, 1947 (Monday).

the contrary; . . . This implied authority to receive payment of firm debts results from each partner's general agency for the firm," . . .

The plaintiff, having totally failed to prove an agreement between the joint venturers to the contrary, has failed to rebut this presumption of implied authority which arises from the joint venture relationship. The plaintiff, therefor, by virtue of the defendants' payments to Adams, plaintiff's joint venturer, must be deemed to have been paid all monies for which recovery is sought.

The record, even if it were reviewed without recognition of this presumption of implied authority, can only support the conclusion that Adams, as agent of plaintiff, had authority to accept the monies collected by him. This is true despite the fact that there is no direct testimony in the record establishing that plaintiff ever *expressly* granted such authority. Authority can be *implied,* as well as express, and when it is the former, it must necessarily be proved by circumstantial evidence.

The *Restatement of the Law of Agency* in Section 26 (pp. 72-75), which is followed by the Arizona courts in the absence of Arizona law to the contrary *(Ingalls v. Neidlinger,* ..... Ariz. ....., 216 P.2d 387, 390 (1950)), states the rule as follows:

"Section 26. Creation of Authority;

General Rule.

". . . authority to do an act may be created by . . . conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

"*Comment:*

"* * * * * * *

". . . the manifestation and not the intention of the principal is important ; hence whenever the principal manifests to the agent that the agent is to act on his account, authority exists although the principal does not, in fact, consent.

"* * * * * * *

"*Comment:*

". . . The manifestations to the agent may be made by the principal directly, or by any means intended to cause the agent to believe that he is authorized or which the principal should realize will cause such belief.

"* * * * * * *

"*Comment:*

". . . The authority to perform a particular act . . . may be created by directing an agent to perform acts which involve the performance of the act in question; or it may be inferred from words or conduct which the principal has reason to know indicate to the agent that he is to do the act for the benefit of the principal.

. . .

"*Illustrations:*

"4. P. delivers a chattel to A and authorizes him to sell it for cash. Nothing is said about delivery to the purchaser or the receipt of payment by A. Having sold the chattel, A has authority to deliver the chattel to the buyer and to receive the purchase price."

Applying this principle, the *Restatement of the Law of Agency* sets down the further rules:

"Section 71. When Authority is Inferred.

"Unless otherwise agreed, authority to receive payment is inferred from authority to conduct a trans-

action if the receipt of payment is incidental to such a transaction, usually accompanies it, or is a reasonably necessary means for accomplishing it."

"Section 34. Circumstances Considered in Interpreting Authority.

"* * * * * * *

"b. If an agent has been previously employed, ordinarily he may assume that he is authorized to continue to do what he has been doing to the knowledge of the principal without objection from him. . . ."

"Section 44. Interpretation of Ambiguous Instructions.

"If an authorization is ambiguous because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal although this is contrary to the principal's intent; . . ."

The case of *Little v. Brown,* 40 Ariz. 206, 11 P.2d 610, 613 (1932), recognizes the general principle that authority can be implied as well as express. The court said:

". . . but agency does not have to be proved by direct testimony. It is susceptible of proof as is any other fact and may be established from the circumstances, such as the relation of the parties to each other and to the subject-matter, their acts and conduct. . . ." (11 P.2d 613).

In *Arizona Storage & Distributing Co. v. Rynning,* 37 Ariz. 232, 293 P. 16, 17 (1930), the court found from the circumstances of the case implied authority in an agent to collect monies saying:

". . . The agency to do a thing may be actual or it may arise from implication. . . ."

Before relating the undisputed facts which, under the above citations, require the conclusion that Adams had implied authority to receive the monies in question, defendants would have the Court note that although there is no direct testimony establishing that he had express authority so to act, *neither is there a whit of testimony directly denying that he had such authority or establishing that he was forbidden or had agreed not so to act.*

Viewed chronologically, the testimony and documentary evidence of this case establish without contradiction the following facts:

(1) Plaintiff, Porter and Adams had entered into similar arrangements pertaining to other cattle (R. 114-116). Whether in these instances Adams collected the proceeds from the sale thereof is uncertain, since in answer to such question, plaintiff's president stated:

"I'd have to check my records to see" (R. 116).

Since the plaintiff's president was uncertain as to Adams' authority to collect in other similar deals, the inference would appear inescapable that he is uncertain as to the extent of Adams' ambiguous authorization in the deal at hand.

(2) When plaintiff purchased the original 1961 head of cattle (only 1213 of which are here involved) and after the making of the plaintiff-Porter-Adams arrangement, plaintiff paid the vendor therefor by means of a draft in the sum of $184,660.40. This draft was executed by:

"Cowden Livestock Co. By Roy Adams." (R. 60)

The Valley National Bank, upon which this draft was drawn, recognized Adams' authority to execute a draft in such amount for plaintiff and paid same (R. 60).

Since Adams, in November, had authority from plaintiff to pay some $184,000.00 of plaintiff's money to a third party to purchase certain cattle, and since there is no evidence of any subsequent restrictions on his authority, the inference would appear inescapable that Adams in the ensuing February, May and July, had authority from plaintiff to collect from a third person some $168,000.00 due to the plaintiff, Porter and himself from the proceeds of sale of a part of the same cattle.

(3) Adams, according to plaintiff's president (R. 113), was authorized to show and sell the cattle, subject to the confirmation of plaintiff. The authority of defendants to sell the cattle for the amounts received is not questioned (R. 121, 156, 157, 132-134), and this authority, prior to receipt of plaintiff's letter of May 15, 1947, necessarily was delegated by Adams, since, prior to that date, plaintiff had never communicated with defendants (R. 124, 142). Since the first time plaintiff discussed with Adams the asking price to be placed on the cattle was after May 15, 1947 (R. 150), and within the first fifteen days of June (R. 83), by which time defendants had disposed of at least 159 head (R. 132), to which plaintiff did not and does not object, it becomes clear that Adams must have had some actual authority to authorize the sale of the cattle. Further evidence of this conclusion is found in the fact that though plaintiff's president set 21½¢ a pound as the selling price for the cattle (R. 83, 124, 125), it did not and does not object to the fact that, after June 15, 1947, defendants sold 59 head for 20¢ a pound; 1 head for 17½¢ a pound, and 105 head for 19½¢ a pound (R. 132, 133).

Since Adams' authority was flexible enough to include this delegation of power of sale, the inference would appear inescapable that the same authority was flexible enough to include that which is incidental to and usually accompanies such authority, the power to receive the sale proceeds, a part of which were to belong to him.

The record is barren of either direct evidence contradicting these conclusions, or evidence from which contradictory conclusions can be inferred. The letter of May 15, 1947, from plaintiff to defendants, does not purport to limit the extent of Adams' authority, and, further, not having been communicated to Adams, cannot be construed as a restriction on his authority for it is fundamental that:

> "* * * notice of the revocation (of authority) must be given the agent; a revocation without notice to him will not render invalid acts done in pursuance of the authority. * * *" (2 *Am. Jur.*, sec. 42, p. 41).

It is also a well settled rule that a principal's failure to object to, and his acquiescence in, an act of an agent after learning thereof, establish that the agent had implied authority to do the act in question. The *Restatement of the Law of Agency* recognizes this principle in Section 43 (pp. 102-104):

> "Section 43. Acquiescence by Principal in Agent's Conduct.
>
> "(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; * * *
>
> "* * * * * * * *
>
> *"Comment:*
>
> "a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of

which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal, indicates that the parties understood that such acts were authorized, * * *

"* * * * * * *

"Comment:

"c. In the absence of other evidence as to the agent's authority, the fact that the principal acquiesces in the conduct of the agent is sufficient evidence to prove authorization * * *"

Late cases applying this last principle to facts not unlike those herein involved are:

Platt v. Union Packing Co., 32 Cal. App. 2d 329, 89 P.2d 662, 666 (1939);

Heck v. Heck, 63 Cal. App. 2d 470, 147 P.2d 110, 112 (1944);

Chase v. Sullivan, 99 Fla. 202, 126 So. 359 (1930).

In the *Platt* case a principal's acquiescence for a period of thirty days in an agent's purchase of cattle was held to constitute sufficient evidence of the principal's prior implied authorization thereof.

The undisputed facts of this case compel application of this last stated principle. Here, by July 9, 1947, Adams had collected from defendants all monies to which he, plaintiff and Porter were entitled out of the sale proceeds (R. 106). By July 16, 1947, plaintiff had learned at least the following facts:

(1) "that Sinton & Brown had sent him (Adams) a check for the cattle" (R. 102);

(2) "that Mr. Adams had directly collected his part of the proceeds" (R. 96);

(3) "that he (Adams) got that $112,000 from Sinton & Brown" (R. 145, 147).

As the lower court found (at the request of plaintiff), on July 16, 1947 Adams advised plaintiff:

> "* * * that he had used the money received from Sinton & Brown to receive some cattle and that, therefore, he then had the proceeds of the settlement with Sinton & Brown available for payment to plaintiff but desider to use such proceeds temporarily." (R. 35, 36)

For twenty-four days after July 16, 1947, the date of receipt of the $44,794.49 check, plaintiff acquiesced in the acts of Adams in making the collections. At the outset it held the check from Wednesday to Saturday before depositing it for collection, knowing that even then the check was not expected to be honored until the subsequent Monday. Thereafter it redeposited the check for collection at least one more time and contacted Adams with reference thereto at least twice more. It was not until August 9, 1947 that plaintiff ceased to look to Adams, and, reversing its field, sought to hold defendants for the monies which Adams had dissipated (R. 86-88, 103-105).

Since Adams' previously conferred authorization reasonably might have included Adams' conduct in making the collections in question, the fact that plaintiff, with knowledge of all material facts, acquiesced in such conduct for over three weeks, compels the conclusion that the conduct was authorized (*Restatement,* Section 43, *ante*). Not only is there an absence of evidence to the contrary, but, as above noted, the other evidence in the record supports this conclusion.

The learned court below, therefore, clearly erred in failing to find that plaintiff has received payment of all monies to which it is entitled and in making the Findings designated above under Specifications V (A), (B) and (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

The *Restatement of the Law of Contracts,* which is the law of Arizona, absent prior decisions to the contrary (*Ingalls v. Neidlinger, ante*), states the following in Section 421 (p. 793):

> "Section 421. Discharge of Duty by a Third Person's Performance.
>
> "A payment or other performance by a third person, accepted by a creditor as full or partial satisfaction of his claim, discharges the debtor's duty in accordance with the terms on which the third person offered it.
> * * *
>
> "* * * * * * *
>
> *"Illustration:*
>
> "1. A owes B a liquidated undisputed debt of $100. C pays B $50 in satisfaction of A's debt, and A (sic) accepts the payment as satisfaction. The payment, being made by a third person discharges the debt."

In *Neavitt v. Upp,* 57 Ariz. 445, 114 P.2d 900, 902 (1941), the Arizona court cited and applied this section of the *Restatement* in holding that a mortgagor was discharged from all obligation to the mortgagee when the mortgagee accepted from a third party a cash sum and bonds in full settlement of the mortgagor's obligation.

In the case at bar the undisputed facts are that Adams (C in the illustration of the *Restatement* quoted above) not only paid B (plaintiff) the $50 ($112,000.00), but also gave "other performance" (delivery of the $44,794.49 check together with a promise to have sufficient cash in the bank six days later to cover that check—not at all unlike the bonds in *Neavitt v. Upp, supra*). If, then, the undisputed facts disclose that B (plaintiff) accepted this payment and other performance as full satisfaction of A's (defendants') obligation, A's (defendants') obligation was discharged. What is the evidence?

At the time of accepting these checks, plaintiff delivered to Adams certain settlement sheets, on the top of one of which the plaintiff had typed:

"COWDEN LIVESTOCK CO.
SETTLEMENT WITH ROY ADAMS ON TEXAS STEER DEAL" (R. 211)

These settlement sheets were of the kind "necessary to make a settlement on a feeding arrangement of this kind" and were drawn up "to settle up the entire transaction" (R. 84, 85). The July 16, 1947 plaintiff-Adams meeting was arranged by plaintiff's president "to make settlement on the deal" (R. 148) and on that date Adams did come "to settle up" (R. 148, 154).

Plaintiff states that it accepted the two checks in the belief that:

> "* * * Adams actually had currently received the funds due from the sale of the cattle and had such funds in his possession or available for payment of the checks * * *" (R. 339).

It is also undisputed that for twenty-four days after receiving Adams' check, plaintiff made no collection overture to defendants, continuing in the interim to attempt collection of Adams' $44,794.49 check, which it deposited for collection at least twice, waiting for at least two weeks for the bank to make collection thereof. This was the same check which, upon receipt, they consented to hold and did hold for three days before attempting collection (R. 86-88, 103-105).

From these facts the conclusion that plaintiff received Adams' check in satisfaction of any obligation of defendants appears inescapable. Indeed, the plaintiff-Adams agreement pertaining to the checks given to plaintiff by Adams at the July 16, 1947 meeting would appear to bring the entire settlement transaction within the rule that a check or note is payment when the party receiving same has agreed thereto (40 *Am. Jur.* pp. 766, 767, 769, sections 76, 79). The high court of New York State found such to be the case in an analogous case. *Stewart v. Union Mut. Life Ins. Co.,* 155 N.Y.S. 257, 49 N.E. 876, 877, 878 (Ct. App. 1898). There an insured sent his insurer a note to cover the amount of his premium. Subsequent thereto the insurer wrote the insured:

> "* * * 'Your note for $123.10 given in settlement of premium due on pol. No. 93,094 will be due and payable on the 31st inst. at your office, where it will be presented at that date' * * *"

The court held on these facts that the note constituted payment, saying:

> "* * * was the note accepted by the company in payment for the first year's premium? The cashier, in

effect, states that it was. He says: 'Your note for $123.10, given in settlement of premium due on pol. No. 93,094, will be due and payable,' etc. It was given in settlement of the premium. Bouvier defines 'settlement' to mean 'payment in full,' so that it would seem that the company not only accepted the note in payment for the first year's premium, * * *"

It would thus appear that the effect of the Adams-plaintiff July 16, 1947 transaction was to extinguish not only the defendants' obligation, but also any obligation of Adams except for that created by the delivery of the check.

The learned court below therefore clearly erred in failing to find that plaintiff has received payment of all monies to which it is entitled and in making the Findings designated above under Specification V (B) and (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That Loss (Specifications III and V(B)).

One branch of the doctrine of estoppel in Arizona is as stated in *Hallenbeck v. Regional Agricultural Credit Corp.*, 47 Ariz. 477, 56 P.2d 1041, 1043 (1936):

"This conclusion is based upon the well-recognized principle of equity that of two innocent persons the one whose act causes a loss should bear it. Green v. Gila Water Company, 36 Ariz. 303, 285 P. 263; California Bank v. Daniel, 36 Ariz. 549, 288 P. 7; Hughes v. Riggs Bank, 29 Ariz. 44, 239 P. 297; Brandon v. Carr, 28 Ariz. 454, 237 P. 642."

While the court below has found that plaintiff's letter of May 15, 1947 to defendants constituted notice of plaintiff's interest in the cattle, the undisputed facts established that defendants had no *actual* notice of plaintiff's interest in the cattle until receipt of plaintiff's letter of August 9, 1947 (R. 260). The vagueness of the wording of the May 15th letter and the utter unlikelihood that defendants would consciously ignore any notice that was in fact designed to protect them, makes it difficult to see how defendants were guilty of any negligence in the matter. The negligence would appear attributable to the draftsman of the misleading letter. Assuming, however, that it may have been defendants' original negligence which set in motion the forces that eventually resulted in a loss to be shouldered by either the plaintiff or the defendants, that negligence was committed in complete good faith.

The undisputed facts also establish that on July 16, 1947 plaintiff had an opportunity to prevent the loss which eventuated. On that date plaintiff knew that all of the material facts pertaining to Adams' collections of monies from defendants and further knew that Adams then had available certain cattle which he had purchased with a portion of the proceeds that he had collected (*ante,* p. 30). At this point plaintiff had, in effect, a "last clear chance" to prevent a loss to either plaintiff or defendants. Had it demanded the monies from Adams or given defendants an opportunity to do so via legal attachment of the cattle which he had purchased, the entire loss could have been prevented. Instead, the plaintiff negligently listened for twenty-four days to Adams' promises to make good his check and only thereafter, as an afterthought, turned to the defendants.

Under these circumstances, the doctrine of the *Hallenbeck* case is applicable and plaintiff should receive nothing from the defendants.

The learned court below therefore clearly erred in failing to find that plaintiff is estopped to claim the monies for which it is suing and in making the Findings designated above under Specification V (B). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections (Specifications IV and V(C)).

A. THE UNDISPUTED FACTS.

Previously set forth (*ante,* p. 30) is the pertinent evidence bearing on what plaintiff knew on July 16, 1947 when it accepted Adams' checks in "settlement" of the arrangement, and what plaintiff did thereafter until its letter of August 9, 1947 to defendants. Without repeating that evidence here or any of the undisputed facts set forth in the Statement of the Case, defendants submit that the record can support only the following conclusions: (1) plaintiff, on July 16, 1947 knew all of the material facts pertaining to Adams' collections; (2) plaintiff approved and affirmed these acts of Adams; (3) Adams in making the collections was intending to act for and on behalf of the plaintiff-Porter-Adams arrangement; (4) while Adams in making the collections did not purport to defendants to be acting for and on behalf of plaintiff, defendants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff. The arguments that follow

assume that all findings of fact contrary thereto are clearly erroneous. Defendants also assume (contrary to fact—see Argument II A. *ante*), for the purposes of these arguments, that Adams, at the time of making the collections, was completely lacking in authority from plaintiff to do so.

B. THE LAW OF RATIFICATION.

1. The Minority Rule.

Treatises quite generally, in their formal statement of the requisite elements of ratification, state that in order for a principal to ratify an unauthorized act of an agent, the agent must have purported to the third person at the time he was doing the act to be acting for and on behalf of his principal. See, e.g., 2 *Am. Jur.*, p. 177, section 222. A majority of the courts of this country have accepted this statement in one form or another without giving the matter any real analysis. See, e.g., *Pullen v. Dale,* 109 F.2d 538, 539 (C.C.A. 9, 1940). A minority of the jurisdictions of this country, however, have refused to follow the doctrine, stating that in order for a principal to ratify the act of his unauthorized agent it is sufficient if the agent at the time of doing the act *intended* to act for his principal.

Hayward v. Langmaid, 181 Mass. 426, 63 N.E. 912 (1902);

Clews v. Jamieson, 182 U.S. 461, 45 L.Ed. 1183, 1184 (1901);

Speer v. Campbell, 167 Wash. 700, 9 P.2d 1100, 1103 (1932).

The majority doctrine found its origin in 1901 in the House of Lords' decision, *Keighley v. Durant* (1901), Appeal Cases 240, which reversed a decision of the Queen's

Bench Division, *Durant v. Roberts* (1900), 1 Q.B. 629, adopting the minority rule. In that case the agent had been authorized by defendant to buy wheat at a certain price. The agent bought of plaintiff at a higher price, contracting in his own name, but intending it to be on the joint account of himself and defendant. This intention was not disclosed to plaintiff. Subsequently defendant acquiesced in the contract and agreed to take the wheat jointly with the agent but failed to do so. Plaintiff sold at a loss and sued defendant for damages. The trial court directed the verdict for defendant. The Queen's Bench Division, in opinions written by Collins, L. J. and Romer, L. J. from which A. L. Smith, L. J. dissented, stated that "the point has never been actually decided" and, in deciding the case "in accordance with * * * principle and common sense," held that the minority rule stated above was the proper one. On appeal, the House of Lords reversed, *Keighley v. Durant, supra.*

In what Mechem terms an "able article,"* these English decisions and all other authorities are given meticulous scrutiny by Professor E. C. Goddard in 2 *Michigan Law Review,* 25 (1903). Prefacing his remarks with the following statement:

> "* * * Here then we have two of the three judges of the Queen's Bench Division and all the judges of the supreme court of Massachusetts, including Holmes, C. J., reaching one conclusion, while all the judges of the supreme court of Michigan† and all the law judges sitting in the House of Lords come to the opposite conclusion. * * *" (2 *Mich. L. Rev.* 25, 26 (1903)),

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*1 *Mechem on Agency* (2d Ed.), p. 283, Section 387, note 2.

†*Ferris v. Snow, et al.*, 130 Mich. 254, 90 N.W. 850 (1902).

Goddard concludes that "no good reason, except a technical one growing out of definition rather than business conditions" has ever been advanced against the adoption of the minority rule (2 *Mich. L. Rev.* 25, 45 (1903)).

Apparently the only other commentators who have analyzed this issue are the authors of the two notes which appear in 22 *Michigan Law Review* 474 (1923) and 22 *Columbia Law Review* 465, 467 (1922). Both of these articles reach the conclusion that the minority rule is the correct one.

The *Columbia Law Review* article carefully considers both views:

> "The instant case, as treated by the court, falls within the fifth classification, being a case where A intends to act for P but purports to act for himself. In England it is now definitely settled that in such a case P cannot ratify. The Supreme Court of the United States and the courts of Massachusetts allow P to ratify, and in New York and Alabama there are dicta to the same effect. But the weight of American authority is that he cannot ratify. This, however, is by no means so well settled as a perusal of texts and encyclopedias would lead one to believe. Many of the cases cited for this proposition are merely dicta, though strongly expressed, being cases where A did not intend to act for P, or cases of sealed instruments.
>
> "One reason given by the courts for refusing to allow ratification in such a case is the fear that a contrary rule would enable A to make a contract in his own name, and either perform it himself, or, if it suited his purpose, declare that he had made it as agent, thus permitting ratification by anyone whom he chose. This reasoning is based on the fact that one can very easily lie about his intentions. Many rules of law, however, make requisite the determination of intention, as in

criminal law. And even in the law of agency itself, the majority of the courts will not allow ratification by P unless A has purported and *intended* to act for P. Furthermore, if the courts are desirous of preventing the shifting of contracts by a falsification of intention, they have not gone far enough. For where A purports to act for an unnamed principal, he can either reveal himself or another as the intended principal.

"Another objection to allowing ratification in this type of case is that it would enable P to become a party to a contract which originally was between T and A, and under which he originally had neither rights nor duties. So to allow seems at first blush inconsistent with the law of contracts. But the doctrines of undisclosed principal, and of ratification, both of which are anomalies in the law of contracts, are well-established parts of the law of agency. The question is not, whether the allowance of ratification would be inconsistent with the theory of contracts; but whether the application of both these doctrines to the same case involves any further and undesirable inroad into the theory. It is submitted that this question is properly answered in the negative.

"As regards P it can make no difference to him what the agent purported, since he knows all the facts, and presumably ratifies because he thinks it to his advantage to do so.

"From the point of view of T, it may be objected that he is made a party to a contract with one to whom he had not intended to become obligated. But that is no different from the ordinary case of the authorized agent for an undisclosed principal. Also, it may be objected that, though T is originally not bound to P, he becomes bound to him without receiving any further consideration. But this, likewise, is no different from the ordinary case of ratification where the third party

becomes bound by the act of the disclosed principal alone.

"Assuming that the doctrines of ratification and of undisclosed principal, despite their anomalous character, are justified in practice, why should they not both be applied simultaneously to the same case if the facts call for such application? Assuming it to be a practicable and desirable rule that P should be represented and bound by A, though A has not revealed P's interest, and assuming it to be a practicable and desirable rule that P should be able by his unilateral acts to assume the rights and duties of a contract which A has made for him, does either rule become the less practicable or the less desirable because of the presence of the other? It hardly seems so.

"The instant case allowed ratification; but it did so only on the express facts of the case. Indeed, it approved in a dictum the doctrine that an undisclosed principal cannot ratify. The unsoundness of this rule is illustrated by the fact that the court refused to follow it to its obvious conclusion. It is unfortunate that the court did not strike at the root of the problem and disapprove the doctrine rather than circumvent it." (22 Col. L. Rev. 465, 467, 468, 469 (1922).)

The *Restatement of the Law of Agency* has in Section 85 adopted the majority rule. It is significant however, that Professor Warren A. Seavey, probably the foremost contributor to the formulation of that work, indicates that *this adoption was due to the authors' belief that it represented "the prevailing view."* Professor Seavey admits that it is "a much disputed point" and that "it is by no means certain that this is the most desirable result." 12 *Neb. L. B.* 247, 251 (1934).

There is no Arizona decision in point, although there are dicta* in two decisions, from which inferences in favor of either the majority or minority rule can be drawn. As stated above, the Arizona courts follow the *Restatement* where there is no Arizona law to the contrary *(Ingalls v. Neidlinger, ante)*. There is, however, one limitation upon this doctrine which has not been previously stated because of the inapplicability of the limitation to the situation then at hand. That limitation has been well stated in the case of *Reed v. Real Detective Pub. Co.*, 63 Ariz. 294, 162 P.2d 133, 137, 138 (1945):

> "This court has adopted the rule that where not bound by its previous decisions or by legislative enactment, it would follow the Restatement of the Law. * * * We think it would be unwise to follow this rule blindly, * * *"

In that case the Arizona court gave careful analysis to the *Restatement's* rules pertaining to an action for the invasion of the right of privacy, and, only after concluding that the *Restatement's* view was sound, accepted same. Defendants submit that this court in determining Arizona law is in exactly the same position as the Arizona court. It can-

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**Gillespie Land & Irrigation Co. v. Hamilton,* 43 Ariz. 102, 29 P.2d 158, 162 (1934): '* * * It is the law that a contract made even by a stranger, to say nothing of an agent without full authority, may be ratified by the principal, * * *''; *Young Mines Co. v. Citizens' State Bank,* 37 Ariz. 521, 296 P. 247, 250 (1931): ''* * * A 'ratification' is the subsequent approval by a principal of a previous unauthorized act by one claiming to act as an agent, and in such case it is immaterial whether there had been an alteration in the position of the parties. To illustrate: B, who is A's agent, pays $5,000 to C without any actual or apparent authority to do so. A, subsequent to the payment, approves it. If A sues to recover the money from C, the latter may plead ratification, but cannot claim an estoppel on these facts alone.''

not follow the *Restatement* "blindly," but must carefully analyze the *Restatement's* view and then either follow it if in this Court's opinion the Arizona court would find that view sound, or reject it if in this Court's opinion the Arizona court would find that view unsound. Defendants ask no more than for this Court to recognize, as has the Arizona court, that an illogical result is too high a price to pay for uniformity.

Defendants submit that the majority rule is patently unsound: "for in every case of an undisclosed principal the contract is ostensibly, and so far as the intention of the other party is concerned, made with the agent, and it clearly is not necessary that the agent should expressly state that he is acting for a principal. There is really no greater difficulty in principle in the introduction of a party into a contract by means of subsequent ratification by him in a case where the person making the contract did not affect to act for a principal than in a case where he did. There being by the hypothesis no antecedent authority to make the contract in either case, in neither could the maxim *'Qui facit per alium facit per se'* apply at the time when the contract was made." ((1900) *1 Q. B.* 631, 632, 633).*

Since the facts will only support the conclusions that Adams was in fact intending to act for and on behalf of plaintiff at the time he collected the monies in question from defendants, and because all the other elements of ratification are present, plaintiff must be deemed to have ratified Adams' acts.

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*The words of Serutton, then the "learned junior counsel" *(1 Q. B.* 631, 634) in *Durant v. Roberts.*

2. The Majority Rule.

Even if, however, this Court should hold that the majority rule is the law of Arizona, plaintiff must be deemed to have ratified Adams' acts within the meaning of that rule. This is because, even under the majority rule:

> "* * * It is not essential that the assumed agent shall have declared himself such in express terms * * *" (1 *Mechem on Agency* (2d Ed.) p. 282, Sec. 386.)

Quoting from the House of Lords decision, *Keighley v. Durant, supra,* Mechem recognizes that the only requirement of the majority rule is that—

> "* * * an agent he must be known to be, and as agent he must act * * *" (*Keighley v. Durant* (1901), Appeal Cases 240, 259).

The lower court has found that defendants had notice of Adams' agency by virtue of the letter of May 15, 1947. Since this letter must be deemed notice of all facts which it would disclose to a reasonable man, it is clear that Adams was known by defendants to be an agent at the time he collected the monies in question. All of the other elements of ratification being present, plaintiff, even under the majority rule, must therefore be deemed to have ratified Adams' collections.

The learned court below therefore clearly erred in failing to find that plaintiff ratified the acts of Adams in collecting the monies in question and in making the Findings hereinabove designated in Specification V (C). Defendants therefore respectfully urge this Honorable Court to correct the error of the court below and enter judgment for defendants.

CONCLUSION

Defendants conclude and summarize their entire argument as follows:

The arrangement between plaintiff, Porter and Adams pertaining to the cattle was clearly that of a joint venture. Not only did these parties have a common purpose in the deal, but also they all made definite contributions to the arrangement and they all took a major part in all decisions pertaining thereto. Furthermore, each was to share equally in any resulting profits or losses. While the sharing of profits may be common to a mere agency relationship, the sharing of losses is most certainly utterly foreign thereto. Being joint venturers with plaintiff, their nonjoinder as indispensable parties-plaintiff was fatal, and plaintiff's complaint should have been dismissed.

Further it is clear that under the Arizona doctrine of estoppel, plaintiff is estopped to demand the monies it is claiming. While it may be that plaintiff's misleading letter gave defendants notice of the plaintiff's claim to the cattle, it is also true that prior to Adams' complete dissipation of the monies plaintiff knew that he had collected same and knew that he had used the portion for which he gave the bad check to purchase other cattle which he then had on hand. Instead of notifying defendants thereof, so that they might have an opportunity to protect themselves by means of attachment or otherwise, plaintiff thereafter, for more than three weeks, sat idly by, listening to Adams' promises while he was becoming insolvent. Under these facts, the Arizona courts will not permit plaintiff to claim any monies from defendants.

Again, the record is clear that plaintiff ratified Adams' acts in collecting the monies, by accepting his checks and thereafter delaying more than three weeks before seeking to be made whole by defendants. It is clear that plaintiff, when it accepted Adams' checks, knew all of the material facts pertaining to his collections, and that its three weeks' acquiescence therein constituted affirmance. Since the record will not support any other conclusion except that Adams, at the time he was accepting the monies, was intending to act on behalf of plaintiff, it follows that under the minority rule discussed above, which defendants submit would be followed by the Arizona courts, plaintiff must be deemed to have ratified his acts. And because of the notice of plaintiff's interest and Adams' agency, which the lower court found defendants to have, plaintiff must be deemed to have ratified his acts even under the majority rule discussed above.

The same undisputed facts as to plaintiff's acquiescence, after knowledge of Adams' acts and prior to its afterthought collection overtures to defendants, when considered with the undisputed facts pertaining to the plaintiff-Adams meeting of July 16, 1947, establish that on that date plaintiff accepted payment ($112,000.00) and other performance (delivery of a check which in effect was a promissory note payable in four days) from Adams as full satisfaction of defendants' obligation, and, indeed, except for the check, of any obligation of Adams.

As must be apparent to this Court, the most striking thing about the undisputed facts and documentary evidence which comprise the record of this case is the overwhelming circumstantial proof that Adams had *implied* authority to make the collections. Since the plaintiff-

Porter-Adams arrangement was a joint venture and because there is no evidence of an agreement among the joint venturers to the contrary, the conclusion as to Adams' implied authority flows from the joint venture relationship itself.

And even if this relationship were ignored, the conclusion is inescapable. While there was no direct testimony that Adams was given express authority to make the collections, neither was there any direct testimony that he had been forbidden or had agreed not so to do. The letter of May 15, 1947, not having been communicated to Adams, does not, of course, contradict the circumstantial evidence. Here was an agent who in November had authority to pay out on behalf of the plaintiff some $184,000.00, with no showing of any restrictions on his authority being imposed thereafter; an agent who may well have had the authority in other similar deals to make collections; an agent who had at least some powers of sale, flexible though they may have been; an agent who participated in all major decisions pertaining to the cattle; an agent who was to bear equally with plaintiff any losses from the deal; an agent who was entitled to at least a portion of the monies which he collected; and an agent in whose acts of collecting some $168,000.00 in July were acquiesced in by plaintiff for some twenty-four days before objecting thereto. If the above circumstances, all of which are uncontrovertedly established through the plaintiff's own evidence, when pieced together, do not establish that Adams had implied authority to make the collections in question, then in truth it may be said that this Honorable Court has held that in Arizona there is no such thing as implied authority, that in Arizona an agent is authorized to do only those things

which a principal expressly states he can do. Defendants respectfully submit that such is not the law of Arizona, nor indeed of any other jurisdiction.

Defendants confidently assert that this Honorable Court, after reviewing the entire evidence, will be left with the definite and firm conviction that a mistake has been committed (*United States v. U. S. Gypsum Co.,* 333 U.S. 364, 395, 92 L. Ed. 746, 766 (1947)).

Wherefore, defendants respectfully urge this Honorable Court to enter judgment in its favor.

Respectfully submitted,

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ADDENDUM

Timetable of Events

October, 1946 —Plaintiff, Adams, Porter enter into tripartite arrangement pertaining to cattle.

October 15, 1946

November 15, 1946—Cattle shipped to Porter at Amarillo, Texas.

November 15, 1946—Plaintiff, by Adams, pays $184,660.40 for cattle and takes bill of sale.

February, 1947 —Adams makes agreement with defendants.

February 14, 1947—Defendants pay Adams $16,000.00 as advance on agreement.

April 1, 1947

April 8, 1947 —Cattle shipped to defendants at Santa Maria, California.

April 28, 1947 —Defendants (Cal.) write Porter (Tex.) for weights.

May 9, 1947 —Defendants (Cal.) wire plaintiff (Ariz.) for weights.

May 10, 1947 —Porter (Tex.) wires defendant (Cal.) giving weights.

May 15, 1947 —Plaintiff (Ariz.) writes defendants (Cal.) giving weights and asking defendants to remit proceeds to plaintiff.

May 16, 1947 —Defendants (Cal.) mail Adams (Ariz.) draft for $129,-314.45.

May 19, 1947 —Defendants (Cal.) mail Adams (Ariz.) draft for $4,843.81.

May 24, 1947 —Adams cashes $4,843.81 check.

End of June —Defendants have sold all cattle receiving proceeds of $240,245.03.

July 5, 1947 —Defendants give Adams at Santa Maria their check for $19,454.27 and give him statements of account.

July 8, 1947 —Plaintiff-Adams telephone conversation arranges July 16 meeting.

July 8, 1947 —Adams cashes $19,454.27 check.

July 9, 1947 —Adams cashes $129,314.45 draft.

July 12, 1947 —$129,314.45 draft paid by defendants' bank.

July 16, 1947 —Plaintiff-Adams meeting at Phoenix, Arizona, at which Adams gives plaintiff personal checks in the sums of $112,000.00 and $44,794.49 and plaintiff gives Adams settlement sheets.

July 16, 1947 —Plaintiff cashes Adams' $112,000.00 check.

July 19, 1947 —Plaintiff deposits Adams' $44,794.49 check for collection.

July 23, 1947 —Adams' $44,794.49 check returned to plaintiff unpaid, plaintiff contacts Adams.

July 24, 1947 —Plaintiff redeposits Adams' $44,794.49 check for collection.

July 31, 1947 —Bank again returns check unpaid.

August , 1947 —Plaintiff again contacts Adams re the check.

August , 1947 —Plaintiff determines Adams' check uncollectible.

August 9, 1947 —Plaintiff demands monies of defendants.

August 13, 1947 —Defendants refuse plaintiff's demands.

August 22, 1947 —Defendants learn for first time that $129,314.45 draft was outstanding until July 12, 1947.